This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 12/13/02.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
Dorene Wiese,	)		
Complainant	)		
	)	**CHARGE NO.:**	**1995 CF 3354**
and	)	**EEOC NO.:**	**21 B 952594**
	)	**ALS NO.:**	**10686**
Board of Trustees of Community	)		
College District No. 508,	)		
Respondent	)		

RECOMMENDED ORDER AND DECISION

This matter came before me on July 19 and 20, 2000 for a public hearing on the complaint filed by the Illinois Department of Human Rights on behalf of Complainant on December 9, 1998. The post-hearing briefs and replies of both parties were duly filed and all transcripts and exhibits are available for examination.

Statement of the Case

The complaint in this case was filed on Complainant's behalf by the Illinois Department of Human Rights ("Department") on December 9, 1998. Respondent filed its answer on January 12, 1999 and verification of the answer on February 25, 1999. A scheduling order was entered on March 3, 1999, followed by an uneventful period of discovery. The joint pre-hearing memorandum was timely filed in accord with the original scheduling order on October 20, 1999. However, the public hearing was continued several times before it was held as noted above. The matter is now ready for decision.

Findings of Fact

The following facts are based upon the record of the public hearing in this matter. Factual assertions made at the public hearing, but not addressed in these findings, were determined to be unproven by a preponderance of the evidence or were otherwise immaterial to the issues at hand. Numbers 1 to 11 are those facts that were classified as "uncontested" by the parties in their joint pre-hearing memorandum, although they may be slightly edited here; these items are marked by an asterisk (*). Citations to the public hearing transcript are indicated as "Tr. ###." Complainant's exhibits admitted into evidence are denoted "CX-#" and Respondent's exhibits are denoted "RX-#."

1. Dorene Wiese was hired by the Board of Trustees of Community College District No. 508 in August, 1980. *

2. Dorene Wiese was Dean of Administration for Respondent from January 7, 1987 through July 6, 1995. *

3. Dorene Wiese is a Native American female and a member of (two) protected Group(s). *

4. The Board of Trustees manages and operates Community College District No. 508, composed of seven public community colleges referred to as the "City Colleges of Chicago." *

5. Truman College is one of the seven public community colleges forming Community College District No. 508.

6. On June 15, 1995, Complainant sent a letter to Ronald Temple, Chancellor of the City Colleges of Chicago, complaining of sexual harassment and sexual discrimination. *

7. On July 6, 1995, Complainant informed the Board of Trustees of the Chicago City Colleges that she had filed sexual harassment, racial and sexual discrimination charges against Dr. Donald Smith. *

8. Complainant received a "Superior" evaluation from Dr. Wallace Appelson in December 1994. This evaluation was not signed by Dr. Donald Smith. *

9. Complainant received a 2% salary increase on or about May 10, 1995 for Fiscal Years 1994 and 1995 (FY94/95). *

10. Clyde Colgrove (white male) received a 6% salary increase on or about May 10, 1995 for FY94/95. *

11. "Mike" Kritikos (white male) received a 6% salary increase on or about May 10, 1995 for FY 94/95. *

12. Dr. Smith did not engage in sexually suggestive behavior during a meeting on March 27, 1995 he attended with Complainant, Cynthia Perry, Audrey Trotter, Cathy Battle and Josie Cantorelli.

13. On April 5, 1995, Dr. Smith did not grab Complainant's breast and state, "If you play along with me, Pocahontas, I won't take everything. I promise. Maybe just a grant or two."

14. On April 27, 1995, Dr. Smith's comment that Complainant looked "attractive" was not sexually motivated.

15. The purported performance evaluation by Dr. Appelson dated December 1, 1994 was not completed in his official capacity, and in any event, was not binding on Respondent for the purposes of salary administration for Fiscal Year 1994 (FY94).

16. The award of a 6% salary adjustment to Clyde Colgrove for FY94 was justified by his role in obtaining professional certification of the automotive repair curriculum.

17. The award of a 6% salary adjustment to Emmanuel "Mike" Kritikos was justified by his development of a telephoe registration system that was eventually adopted throughout the city colleges system.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B) respectively.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Respondent was Complainant's employer for all periods of time relevant to the complaint.

4. Complainant was not a victim of sexual harassment perpetrated by Dr. Smith.

5. Complainant is not "similarly situated" to Clyde Colgrove and "Mike" Kritikos for the purposes of the FY94/95 merit salary adjustments.

6. Complainant did not engage in a protected activity prior to the alleged retaliatory action by Respondent in not granting her a higher merit salary adjustment for FY94/95.

7. Respondent did not engage in retaliation against Complainant for any alleged protected activity on her part.

Discussion

A. "Dean of Administration"

The elimination of Complainant's position as Dean of Administration at Truman College is not included among the allegations in the complaint for this case. However, the history of

events leading to the arrival of Dr. Donald Smith on campus as the acting college president is helpful to an understanding of the context in which the incidents that are alleged in the complaint occurred.

Complainant was employed as the Dean for Administration at Truman College for eight years. She was closely identified with the long-time president of the college, Dr. Wallace Appelson. When Dr. Appelson's tenure came under a cloud due to his own alleged sexual harassment of a female employee at the college, and he was subsequently relieved of his position on October 25, 1994 (Tr. 46), the succeeding acting administration sought to reverse some of the policies and organizational structure he instituted. One change was to constrict and, ultimately, eliminate the position of Dean of Administration, the position held by Complainant.

During his tenure as president of Truman College, Dr. Appelson imposed his own particular management style on the College, resulting in an organization chart that did not conform to that found at the other six colleges in the City College system, including creation of the Dean of Administration position. The position on the typical District 508 organizational chart from which the Dean of Administration position grew was that of "administrative assistant to the president," a high level clerical or executive secretarial position.

Over time, the central administration of the college system found fault with Dr. Appelson's organizational arrangement, including the unique Dean of Administration position. Even before his forced resignation, the new vice-chancellor for human resources, Jack Calabro, spoke to Dr. Appelson about restructuring the senior management function at Truman College to reflect the more typical arrangement found throughout the system. Tr. 166. Dr. Appelson successfully resisted these attempts by the central office until he was replaced due to his alleged

misconduct. With Dr. Appelson both discredited and departed, there was no voice to advocate in support of his administrative innovations generally or on behalf of Complainant personally.

B. Analysis

Although the complaint in this case is stated in one count, it contains four separate allegations of prohibited conduct on the part of Respondent: 1) that Respondent, through the actions of Dr. Donald Smith, the interim president who succeeded Dr. Appelson, sexually harassed Complainant; 2) that Respondent unlawfully discriminated against Complainant in the granting of a salary increase due to her sex, female; 3) that Respondent unlawfully discriminated against Complainant in the granting of a salary increase due to her race, American Indian/Alaskan Native; and, 4) Respondent retaliated against Complainant because she opposed sexual harassment.

1. Sexual Harassment. -- The Human Rights Act (HRA) defines sexual harassment as "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 775 ILCS 5/2-101(E). In this complaint, Complainant has alleged conduct that is actionable under Section 2-101(E) if it is proven and is found to be legally sufficient to constitute sexual harassment.

The allegations of sexual harassment found in the complaint are: a) that on March 27, 1995, Dr. Smith repeatedly glanced from Complainant to his groin in a sexually provocative manner during a meeting that included at least three other women as participants along with

Complainant and Dr. Smith; b) that on or about April 5, 1995, Dr. Smith removed Complainant's managerial responsibilities for several specialized programs of the college, but said to her as he grabbed her breast, "If you play along with me Pocahontas, I won't take everything, maybe just a grant or two;" and, c) that on April 27, 1995, Dr. Smith told Complainant that she "looked attractive" while she was dressed in Native American clothing.

The second alleged incidence of sexual harassment will be considered first. On April 5, 1995, Dr. Smith went to Complainant's office to tell her that she would no longer have oversight of several programs of the college, including the Alternative High School and the Lakeview Learning Center, programs that were both personally and professionally important to Complainant. In her shock upon hearing this news, Complainant stated that she walked around her desk where Dr. Smith allegedly grabbed her breast and said, "If you play along with me, Pocahontas, I won't take everything. I promise. Maybe just a grant or two." Complainant then returned to the other side of her desk and Dr. Smith left, saying that she should take the rest of the day off. Tr. 68-69.

Quid pro quo sexual harassment occurs when "the complainant proves by a preponderance of the evidence that she was either penalized for her refusal to submit to unwelcome sexual conduct, or a tangible job benefit was conditioned upon such submission." Carson and Dixon Country Club, Inc., Ill. H.R.C. Rep. (1991CF2770, June 3, 1998). Here, however, the statement and actions attributed to Dr. Smith cannot be given credence. When the remark was allegedly made, he had already told Complainant that two of the major programs under her supervision were being reassigned. There is no evidence in the record that he ever offered to rescind this decision, or that he ever further defined how Complainant could "play along" with him in consideration of any other decisions he made with regard to her or the Dean

of Administration position. Dr. Smith's recollection of this encounter with Complainant is more credible. He stated that upon hearing that the programs were being transferred, she remained seated and started crying. Tr. 125-26. This is a more likely account of the events that occurred on that occasion There is no evidence to support the allegation that Complainant suffered *quid pro quo* sexual harassment by Dr. Smith at any time while they both were at Truman College.

Incidents a. and c. noted above both occurred in the full view of independent witnesses. At the meeting on March 27, 1995, Dr. Smith sat in on a meeting concerning marketing of the college. He was not the chairperson of the meeting and was apparently more of an observer than a participant. The actual participants were Cynthia Perry as chairperson, Audrey Trotter, Cathy Battle, Josie Cantorelli and Complainant. In her testimony, Complainant indicated that Dr. Smith sat directly across the conference table from her, a distance of about six feet. Tr. 65. During the meeting, Dr. Smith "was sitting way up in his chair above the table, ... with his groin area raised above the table in a very odd way, and he kept looking at me, glaring at me, and looking back and forth, and looking at his groin area." Tr. 62.

Respondent presented three witnesses who also attended the March 27th meeting: Dr. Smith, Cynthia Perry and Cathy Battle. Dr. Smith recalled the meeting and acknowledged that he sometimes leaned back in his chair on such occasions. He denied that he looked at his groin followed by stares at Complainant. Tr. 123-25. Neither Ms. Perry nor Ms. Battle could remember a specific meeting on March 27th, but they could remember in general attending meetings also attended by Complainant and Dr. Smith. Ms. Battle also noted that it was Dr. Smith's "style" to lean back in chairs on such occasions, but she could not recall ever seeing him engaged in the sequence of actions described by Complainant. Tr. 149. Ms. Perry also recalled attending a number of meetings including the individuals listed for the March 27th meeting and

seemed to have some recollection of that meeting without independently being able to recall the exact date. She testified that she did not recall seeing Dr. Smith leaning back in his chair or engaging in the other actions attributed to him by Complainant. Tr. 153.

It is clear that the job responsibilities of Complainant, Ms. Perry, Ms. Battle and Dr. Smith frequently brought them together at meetings. Except for Complainant's allegations regarding Dr. Smith's alleged actions on March 27th, none of the participants recalled Dr. Smith ever engaging in the sequence of body movements alleged by Complainant.

The third alleged incident of sexual harassment occurred on April 27, 1995. During a special program at the college, Complainant was dressed in Native American clothing when Dr. Smith passed through the area while conducting a tour of the college facilities for a new board public relations employee. Complainant stated that when Dr. Smith encountered her, he "leered" at her, looked her "up and down" and said, "You look quite attractive." Tr. 72-73. This incident occurred in a public place during a scheduled event at the college while Dr. Smith was accompanying a new employee of the central office. While Dr. Smith acknowledged telling Complainant that she looked attractive on that occasion after she was apologetic for not being in normal business attire, he denied "leering" or "ogling" her. Tr. 127-28.

An allegation of sexual harassment cannot be proven unless the alleged conduct is shown to be sexual in nature. There is no credible evidence that incidents a. and c. described above were sexual or were sexually motivated. While it may be argued whether it was appropriate for Dr. Smith to habitually sprawl in his chair during meetings or to make comments about how subordinates looked at any given time, there is no credible evidence that these actions were sexual or that they were directed at Complainant for any sexual purpose. I find that these alleged

incidents, even taken in the light most favorable to the Complainant, do not constitute sexual harassment.

2. The FY94/95 Merit Salary Adjustment. -- The complaint also alleges that Respondent discriminated against Complainant by reason of her sex, female, and her race, American Indian/Alaskan Native, in the setting of her FY94/95 merit salary increase and that this same action also was taken in retaliation for her opposition to sexual harassment. Each of these allegations are focused on the 2% merit salary increase given to Complainant for FY94/95. It is alleged that other employees who were neither female nor American Indian/Alaskan Native with the same or lesser performance levels were given higher increases.

Formal performance reviews were not instituted in the city colleges until 1991. For each year until his removal as president of Truman College, Dr. Appelson always gave Complainant the highest overall rating of "Superior" on her reviews. However, Dr. Appelson left his position at Truman College in Fall, 1994 without filing Complainant's formal review for FY94. It is undisputed that a handwritten performance review dated December 1, 1994 and signed by Complainant and Dr. Appelson was executed after he departed and was never placed in her personnel file. CX-2. Complainant was again rated "Superior" in the December 1, 1994 review.

Dr. Smith and Jack Calabro, the vice-chancellor for human resources of the city colleges during the relevant time period, both testified that when the merit raises for FY94/95 were processed during Spring, 1995, the college system was in the midst of a difficult time financially. A specific fund for raises was established at each college, with an expectation that most raises would be no more than 3%. RX-2. In his first submission of proposed increases, Dr. Smith recommended that Complainant receive 3%. The chancellor later determined that the initial plan was not feasible and he ordered that in the absence of sufficient reasons not to do so, he would

reduce all of the proposed increases by 1%. Subsequently, Complainant's proposed increase, along with nearly all others, was decreased to 2%.

Two individuals, both male/white, were recommended for special consideration by Dr. Smith in the initial list of merit raises and he continued to advocate for them after the call for further reductions. Subsequently, these recommendations survived the blanket reduction imposed by the chancellor as noted above and both men were given 6% increases. Clyde Colgrove led the successful effort to obtain professional certification for the automotive repair curriculum at the college, a rare recognition for such an institution. The second man, Emmanuel "Mike" Kritikos, was instrumental in planning and instituting a telephone registration system that was adapted for use throughout the city colleges system.

There is no direct evidence that the setting of the percentage increases for Complainant was guided by discriminatory animus on the part of Dr. Smith. Therefore, the analysis of these elements of the complaint must be done according to the principles stated in McDonnell Douglas Corp. Green, 411 U.S. 792 (1973). This process requires the Complainant to first establish a *prima facie* case of discrimination by a preponderance of the evidence, which can then be rebutted by the articulation (not proof) of a "legitimate, nondiscriminatory reason" by Respondent for the action taken. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If this is done successfully, Complainant must then establish, again by a preponderance of the evidence, that the reason advanced by Respondent is merely a pretext for the alleged discriminatory conduct. This method of proof has been adopted by the Commission and approved for use here by the Illinois Supreme Court. Zaderaka v. Illinois Human Rights Comm'n, 131 Ill.2d 172, 178, 545 N.E.2d 684, 137 Ill.Dec. 31 (1989).

The elements of the *prima facie* case in this case are similar with regard to discrimination based both on sex and race: 1) that Complainant is a member of a protected class; 2) that Complainant was performing her work responsibilities in a satisfactory manner; 3) she suffered an adverse employment action; and, 4) similarly situated employees outside the protected classes were treated more favorably than Complainant. It is undisputed that Complainant is a member of two protected classes in that she is female and she is an American Indian/Native Alaskan, and therefore satisfies the first prong of the *prima facie* case.

With regard to the second prong, Complainant's assertion that she was satisfactorily performing in her position as Dean of Administration is borne out by the fact that she was awarded a 2% merit increase in her salary by Dr. Smith. This increase, originally proposed for 3% by Dr. Smith, was the amount designated for "satisfactory" performance in the truncated merit plan for FY94. RX-2. To support its contention that Complainant was not performing satisfactorily, Respondent maintains that Complainant's position was redundant and that she was frequently absent. Even if these concerns were valid, Dr. Smith still chose to award Complainant the increase commensurate with satisfactory performance. Therefore, Complainant satisfies the second element of the *prima facie* case.

As for the third prong, it can be an adverse employment action when an employer does not provide a merit increase to an employee of the magnitude allegedly deserved by that employee. Very few employees, or employers for that matter, would dispute the significance of the salary schedule in the context of the employment relationship. Within the administrative structure of most large employers, a great deal of effort and resources are devoted to the salary plan. The extensive paper work and time apparently spent by high-ranking administrators of the college system in agonizing over the FY94/95 salary adjustments that are relevant to this case

confirm that this Respondent is no different from other employers in this regard. Therefore, at least for the purposes of her *prima facie* case, Complainant has shown that she suffered an adverse employment action when Respondent failed to give her higher than a 2% merit increase for FY94/95.

While Complainant is able to establish the first three prongs of her *prima facie* case, she does not fare as well with the fourth prong. Complainant alleges that she was given a 2% increase while Clyde Colgrove and Mike Kritikos, both male and white, were given 6% increases; it is undisputed that these figures are accurate. RX-5. For the purpose of the analysis of this element of the *prima facie* case, I find that there is a reasonable basis to consider all 25 of the so-called "non-bargained for employees" listed in RX-3 (and, later, RX-5) as being related to each other in that their FY94 merit salary increases were derived from the same pool defined by the chancellor and processed by Dr. Smith. Complainant, Colgrove and Kritikos are all included in the list of "non-bargained for employees" found in RX-3 and RX-5. This, however, is not the end of the analysis to determine if Colgrove and Kritikos are "similarly situated" to Complainant in determining if discriminatory conduct occurred.

As was previously noted, Respondent contends that Colgrove was instrumental in achieving professional certification of the automotive repair training program at the college. Not only was this a desirable development for the students in the program, it was unusual, if not unique, for a community college at that time. Further, it was asserted that Kritikos developed a telephone registration system that was put in use throughout the city college system. Because these were exceptional achievements that exceeded the expected requirements of their respective positions, Respondent maintains that both were entitled to special consideration under the salary plan, even in light of the lean times. Complainant argues that "(u)nique accomplishments are not

the basis for salary increases," but provides no evidentiary or legal support for this position. Complainant's Proposed Findings of Fact and Conclusions of Law at 13.

Complainant is not similarly situated to Colgrove and Kritikos for the purpose of establishing this prong of her *prima facie* case because the men were found to have unique accomplishments that justified special consideration in determining the level of their salary adjustments for FY94/95. Complainant did not have any such unique accomplishments for FY94/95 and therefore cannot be considered "similarly situated" to Colgrove and Kritikos. She therefore fails to meet her *prima facie* case regarding her allegations of discrimination in the administration of the salary adjustment plan for FY94/95. Therefore, the McDonnell Douglas analysis ends here and it must be recommended that all aspects of the complaint dealing with discrimination in allocating salary adjustments for FY94/95 be dismissed with prejudice.

3. Retaliation. -- Finally, the complaint also alleges that Complainant was denied a higher pay increase in retaliation for her opposition to sexual harassment. The standard for proving a retaliation allegation is that: a) the Complainant engaged in a protected activity; b) the Respondent committed an adverse act against her; and, c) there is a causal nexus between the protected activity and the adverse act. Maye v. Illinois Human Rights Comm'n, 224 Ill.App.3d 353, 586 N.E.2d 550, 166 Ill.Dec. 592 (1st Dist. 1991). In this case, Complainant cannot prove by a preponderance of the evidence that she engaged in a protected activity.

Complainant asserts that she opposed unlawful sexual harassment in the workplace and therefore was engaged in a protected activity. However, the record in this case is, at best, ambiguous about when, how and to whom Complainant registered her concerns about sexual harassment. The only credible contemporary evidence of her opposition to sexual harassment are that Complainant filed her charge in this case on June 14, 1995 and that on June 15, 1995, she

sent a letter to the chancellor of the city college system in which she stated in general terms the nature of her allegations. She further noted in the letter that "(o)n April 3, 1995, (Complainant) alluded to these problems in the presence of Sharon Tiller, staff attorney, and a Human Rights Commission (*sic*) investigator who was also present."

However, the salary adjustments for FY94/95 were processed prior to the filing of the charge and submission of the letter. This apparently means that the April 3, 1995 encounter among Complainant, Attorney Tiller and the Department investigator is the source of Complainant's opposition to sexual harassment for the purposes of this complaint. However, details surrounding the April 3rd encounter are not found anywhere in the record. It does appear, however, that the primary context for the conversation on April 3, 1995 was not Complainant's personal concerns about sexual harassment. At the time of the conversation, only the March 27, 1995 incident among the three alleged incidents of sexual harassment directed at Complainant had occurred. Complainant's choice of words in the letter is also curious. To "allude" to a situation is not to confront it straight on or in specific terms. It is possible that the "allusion" was missed by Ms. Tiller, or that the primary purpose of the meeting that day overwhelmed the import of the "allusion." In this murky record, Complainant cannot establish by a preponderance of the evidence that she openly opposed sexual harassment in the workplace prior to the alleged retaliatory action by Respondent. It is recommended that the Commission find that there was no retaliation on the part of Respondent toward Complainant.

* * *

Finally, Respondent attached a copy of the "Investigation Report" from the Illinois Department of Human Rights as Exhibit A to its Responsive Post-Hearing Brief filed on

October 24, 2000. The Commission has long held that "the Department's investigation report is not admissible evidence because it is unsworn and is patently hearsay." Taylor and Dominic Fiordirosa Construction Company, Inc., Ill. H.R.C. Rep. (1996CF0400, June 12, 2000) (and cases cited therein). Therefore, the investigation report is not included in the record of this case. References to it in Respondent's reply brief were disregarded and no portion of it was consulted in the analysis of any aspect of this recommended decision.

Recommendation

It is recommended that the complaint and underlying charge in this matter be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

ENTERED: BY: _____
DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
November 6, 2002 ADMINISTRATIVE LAW SECTION

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